Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ROBIN PEARSON,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Ia. Whether Counts I through IV of the indictment should have been dismissed on the ground that section 922(o) of Title 18, making the mere possession of a machine gun a federal offense, cannot be upheld on the basis of the Interstate Commerce Clause or any other provision of the Constitution.

1b. Whether Count V of the indictment should have been dismissed on the ground that section 5861(d) of Title 26, making the mere possession of an unregistered firearm a federal offense, cannot be upheld on the basis of Congress' power to tax or any other provision of the Constitution.

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CITATION TO OPINION AND JUDGMENT BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reproduced in the Appendix to this Petition for Writ of Certiorari.

JURISDICTION

Petitioner was charged in a five count indictment in the United States District Court for the Eastern District of Missouri. Counts I through IV charged possession of machine guns in violation of Title 18 U.S.C. §922(o). Count V charged possession of a silencer not identified by serial number in violation of Title 26 U.S.C. §§5861(d) and 5871. Petitioner moved to dismiss the

indictment in its entirety due to its failure to allege any nexus to any enumerated power of Congress to regulate the possession of these items. The motion was denied.

On February 2, 1993, a jury found Petitioner guilty. On May 13, 1993, Petitioner received concurrent terms of 27 months on each count.

Petitioner's conviction was affirmed by the United States Court of Appeals for the Eighth Circuit on November 1, 1993 (reproduced in Appendix). Petitioner filed a Motion for Rehearing by Panel on November 10, 1993 (reproduced in Appendix). This motion was considered and denied on December 8, 1993 (reproduced in Appendix).

Jurisdiction of this Honorable Court to review the judgment of the Eighth Circuit is invoked by Petitioner under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

Article I, Section 8 of the United States Constitution states as follows:

> The Congress shall have power to regulate commerce with foreign nations, and among the several states and with Indian Tribes.

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT OF THE CASE

Petitioner Pearson was charged and convicted of four counts of possession of a machine gun in violation of Title 18 U.S.C., §922(o). In addition, Petitioner was charged and convicted of

possession of a silencer not identified by serial number, in violation of Title 26 U.S.C. §§5861(d) and 5871.

Prior to trial, Petitioner filed a motion to dismiss the indictment in its entirety. Petitioner argued that there was no nexus between the possession charges and interstate commerce and that, therefore, Section 922(o), Title 18 U.S.C. and Sections 5861(d) and 5871 are unconstitutional.

The motion to dismiss was denied, and, following a jury trial, Petitioner was found guilty of all five counts and given concurrent terms of 27 months on each count.

REASONS RELIED UPON FOR ALLOWANCE OF THIS WRIT

This Honorable Court should grant this Petition for Writ of Certiorari for the reason that Congress lacked authority, under its power to regulate interstate commerce pursuant to Article I, Section 8 of the Constitution, to prohibit the mere possession of a machine gun or silencer.

Where Petitioner manufactured the machine guns by himself, in his own house, his act of possession of the machine guns and silencer manifestly did not affect interstate commerce.

ARGUMENT

The sole issue is the constitutionality of the statutes under which Petitioner was convicted. The statutes under which Petitioner was convicted are unconstitutional because the Interstate Commerce Clause does not authorize Congress to prohibit the mere possession of a machine gun or silencer.

Counts I, II, III and IV charged that Petitioner possessed machine guns in violation of Section 922(o) of Title 18 (18 U.S.C. §922(o)). As the following shows, Section 922(o) prohibits mere possession of a machine gun without any nexus to any enumerated power of Congress, and accordingly is unconstitutional.

Count Five charged possession of a silencer which is not identified by serial number, in violation of 26 U.S.C. §§5861(d) and 5871.

18 U.S.C. §922(o), which became effective on May 19, 1986, states:

> (1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machine gun.
>
> (2) This subsection does not apply with respect to —

(a) A transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(b) Any lawful transfer or lawful possession of a machine gun that was lawfully possessed before the date this subsection takes effect.

"Section 922(o) prohibits the private possession of machine guns not lawfully possessed before May 19, 1986." *Farmer v. Higgins*, 907 F.2d 1041, 1045, (11th Cir. 1990), *cert. denied* 112 L.Ed.2d 773 (1991). Section 922(o) bans possession, by any person without exception, of a certain type of firearm without any mention of a nexus to interstate commerce. Section 922(o) would be the first such firearms ban in U.S. history.

Congress is limited to the powers enumerated in Article I, Section 8 of the United States Constitution, and does not have unlimited power to ban private, intrastate, noncommercial possession of a firearm or any other object, without an interstate commerce element of the offense or a finding or even the hint of an effect on interstate commerce. Previous firearms regulations were based on Congress' powers to raise revenue[1] and to regulate interstate commerce.

In enacting the Gun Control Act of 1968, Congress rejected a proposal that would not have been based on the interstate commerce or tax powers. Fred B. Smith, General Counsel of the Treasury Department, noted that the proposal "would make it unlawful for a person under 21 years of age to possess a National Firearms Act Firearm." Federal Firearms Act: Hearings before the Subcommittee to Investigate Juvenile Delinquency, Judiciary Committee, U.S. Senate, 90th Cong., 1st Sess., 1088 (1967). Smith states:

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[1] The revenue power is the basis of the National Firearms Act. *Sonzinsky v. United States*, 300 U.S. 506 (1937).

> It seems doubtful that the ... provision can be justified under the taxing or commerce powers, or under any other power enumerated in the Constitution, for Federal enactment. Consequently, the Department questions the admissibility of including in the bill a measure which could be construed as an usurpation of a (police) power reserved to the states by Article X of the United States Constitutional Amendments. *Id.* at 1089.

Section 922(o) is not supplemental to the National Firearms Act, a revenue measure, nor is it limited to regulating the transfer or possession of machine guns in interstate or foreign commerce. Yet Congress has no power to prohibit transfer or possession of newly manufactured machine guns, within respective states or in intrastate commerce, but may only regulate them under the revenue and interstate commerce powers delegated by Article I, Section 8 of the Constitution.

The power of Congress even to ban possession of firearms by felons has been exercised and upheld only because the statutes make an effect on, or nexus with, interstate commerce, an element of the offense.[2] *United States v. Bass*, 404 U.S. 336 (1971) determined: "We do not reach the question whether, *upon appropriate findings*, Congress can constitutionally punish the 'mere possession' of firearms ..." *Id.* at 339 n.4 (emphasis added). Still, the court held: "Because its sanctions are criminal and because, under the Government's broader reading, the

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[2] 18 U.S.C. §922(o) provides:

It shall be unlawful for any person —

(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year; ... to *ship or transport in interstate or foreign commerce*, or *possess in or affecting commerce*, any firearm or ammunition; or to receive any firearm or ammunition which has been *shipped or transported in interstate or foreign commerce* (Emphasis added.)

statute would mark a major inroad into a domain traditionally left to the states, we refuse to adopt the broad reading in the absence of a clearer direction from Congress." *Id.* at 339. Unfortunately, Section 922(o) is not susceptible to a narrow reading as would sustain its constitutionality, as was the case in *Bass*.

The basis of the above holding is that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *Id.* at 349. The court elaborated as follows:

> In the instant case, the broad construction urged by the Government renders traditionally local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources. Absent proof of some interstate commerce nexus in each case, [18 U.S.C. App] Section 1202(a) dramatically intrudes upon traditional state criminal jurisdiction . . . . The legislative history provides scanty basis for concluding that Congress faced these serious questions and meant to affect the federal-state balance in the way now claimed by the Government. Absent a clearer statement of intention from Congress than is present here, we do not interpret Section 1202(a) to reach the "mere possession" of firearms. *Id.* at 350.

The court's conclusion left no question about the need of statutes to be consistent with federal jurisdiction: "Consistent with our regard for the sensitive relation between federal and state criminal jurisdiction, our reading preserves as an element of all offenses a requirement suited to federal criminal jurisdiction alone." *Id.* at 351.

The Court of Appeals in *Bass*, 434 F.2d 1296, 1298 (2nd Cir. 1970), had noted that "the commerce language was inserted to avoid questions of the scope of Congressional power and to mirror the approach to federal criminal jurisdiction reflected in

many other federal statutes." (citing 18 U.S.C. §1951 [obstructing commodities in interstate commerce by extortion]; 18 U.S.C. §875 [kidnapping threats in interstate commerce]; 18 U.S.C. §2421 [transporting prostitutes in interstate commerce]).

Felon possession must be proven to affect commerce "to avoid a reading which would create serious constitutional doubts." *Id.*

The court surveyed several statutes and Supreme Court opinions to conclude that "in each of these cases there is something more than the mere bald assertion that a particular activity is a burden on interstate commerce." *Id.* at 1300. By contrast, in support of the Congressional findings in the felon-firearms prohibition, "all that is present in the 'debates' are statements by the bill's author based on nothing but conjecture and a series of inferences which, if accepted, would support federal legislation concerning almost any criminal matter." *Id.* Accordingly, the court read the statute to require proof of an interstate commerce nexus. The statute in the case at bar cannot be sustained in this matter.

By contrast, the federal ban on discrimination by places of public accommodations was upheld because "the voluminous testimony presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel." *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 253 (1964). In his concurring opinion, Justice Black noted: "'commerce' as used in the Commerce Clause . . . includes not only, as Congress has enumerated in the Act, 'travel, trade, traffic, commerce, transportation, or communication,' but also all other unitary transactions and activities that take place in more States than one." No commercial nexus, much less an interstate commerce nexus, exists in Section 922(o).

The Supreme Court has continued to require an interstate commerce nexus in cases involving firearms. *Scarborough v.*

United States, 431 U.S. 563 (1977), held that a felon could be convicted under 18 U.S.C. App. §1202 (a) (1) where the firearm was shipped in interstate commerce before the felony conviction. The legislative history revealed that the statute's purpose was "to proscribe mere possession but that there was some concern about the constitutionality of such a statute. . . . However, we see no indication that Congress intended to require any more than the minimal nexus that the firearm has been, at some time, in interstate commerce." *Id.* at 575.

The court has continued to follow the *Bass* rule against statutes that allow federal intrusion into traditional matters of state concern. *Will v. Michigan Dept. of State Police*, 109 S. Ct. 2304, 2308-09, 105 L. Ed.2d 45 (1989); *Bowen v. American Hospital Association*, 476 U.S. 610, 644-45 (1986) (invalidating agency regulations).

Mere possession of firearms with no nexus to interstate commerce is traditionally a matter for state and local criminal law, as *Bass* recognized. The court has continued to apply *Bass* to other such crimes. *E.g.*, *Williams v. United States*, 458 U.S. 279, 289-90 (1982) (bad checks).

Mere possession of a firearm is neither "interstate" nor "commerce," nor did anyone in Congress remotely suggest that it affects interstate commerce. Those terms were explained in *United States v. South-Eastern Underwriters Asso.*, 322 U.S. 533, 550-51 (1944) as follows:

> The most widely accepted general description of that part of commerce which is subject to the federal power is that given in 1824 by Chief Justice Marshall in Gibbons v. Ogden, 9 Wheat. (US) 1, 189, 190, 6 L Ed 23, 68, 69. "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its

branches. . . ." Commerce is interstate, he said, when it "concerns more States than one." *Id.* 9 Wheat. (US) 6 L Ed 69.

The court reiterated that commerce 'embraces every phase of commercial and business activity and intercourse.' . . . Commerce 'comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities." 322 U.S. at 551 n.34.

Nothing in Section 922 (o) , the Congressional findings, or the legislative history suggests that Congress was exercising a power enumerated in Article I, Section 8 of the Constitution, such as that Congress found mere possession of this firearm to be a burden on establishing post offices, coining money, or interstate commerce.

Without any interstate commerce nexus being required in the statute or expressed in its findings, it cannot be assumed that Congress intended to exercise its interstate commerce power in passage of Section 922 (o). No Supreme Court case has ever upheld an exercise of the interstate commerce power under these conditions.

In sharp contrast to the case at bar, in *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 116 (1942), the statute provided that the Secretary of Agriculture "shall regulate in the manner hereinafter in this section provided, only such handling of such agricultural commodity or product thereof, as is *in the current of interstate or foreign commerce*, or which *directly burdens, obstructs, or affects, interstate or foreign commerce* in such commodity or product thereof." (Emphasis added.)

Similarly, in *Wickard v. Filburn*, 317 U.S. 111, 125 (1942), the court found that activity may "be reached by Congress if it exerts a substantial economic effect on interstate commerce . . . ." Accordingly, the court upheld regulation of wheat growing

because it is an *economic* activity with a collective, substantial effect on interstate commerce.[3]

In *Perez v. United States*, 402 U.S. 146, 155 (1971), the Supreme Court upheld a federal statute prohibiting loansharking because "the findings by Congress are quite adequate" to show that loansharking involves large-scale credit transactions and interstate economic activity, and thus affects interstate commerce. The court cited extensive testimony and studies relied on by Congress to demonstrate the effects of loansharking on interstate commerce. "The essence of all these reports and hearings was summarized and embodied in formal congressional findings." *Id.* at 156[4].

Perez makes clear the function of judicial review in such cases. "Sometimes Congress itself has said that a particular activity affects the commerce, as it did in the present Act. ... In

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[3] Federal law concerning drugs has also been sensitive to the need for exercise of a constitutional power of Congress. For instance, *United States v. Visman*, 919 F.2d 1390, 1392 (9th Cir. 1990) notes: Provisions to the Drug Act, including Congressional findings and declarations. In Section 801, Congress specifically found that a nexus exists between marijuana and interstate commerce. Congress concluded that controlled substances have a "detrimental effect on the health and general welfare of the American people." 21 U.S.C. §801(2). Congress also found that "local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances." 21 U.S.C. §801(4). Congress also found that "federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic." 21 U.S.C. §801(6).

[4] The court in *Perez* quoted in part the following findings of Congress in the act:

> Extortionate credit transactions are carried on to a substantial extent in interstate and foreign commerce and through the means and instrumentalities of such commerce. Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce. *Id.* at 147 n.1.

passing on the validity of the class last mentioned, the only function of the courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power." *Id.* at 152 (emphasis added).

Sixth Circuit precedent on felons in possession demonstrates the unconstitutionality of Section 922(o) here. As stated in *United States v. Brown*, 533 F.2d 1387, 1392 (6th Cir. 1976): "Congress used its powers under the commerce clause of the Constitution to enact the statute [18 U.S.C. App. §1202(a)]. . . . Thus, the statute prohibits possession, receipt, or transportation of a firearm by a felon in or affecting commerce." As the court noted, *"the commerce nexus is jurisdictional,"* *Id.* at 1393 (emphasis added), i.e., the basis for assertion of federal power.

In the pre-*Bass* case of *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971), the court asked "whether Congress has the power to prohibit the possession of a firearm by a convicted felon," and held that "Congress has this authority under the commerce clause." This basis of this decision was the explicit declaration passed by Congress that felons in possession of firearms burdened interstate commerce:[5]

> In its above-quoted findings preceding Section 1202, Congress declared that "the receipt, possession or transportation of a firearm by felon, *** constitutes — (1) a burden on commerce or threat affecting the free flow of commerce. *** [18 U.S.C. App. §1201] If this finding is accurate, there can be no doubt that Congress has the power to prohibit the possession of firearms by convicted felons. *Id.* at 151.

The court did not automatically uphold the finding of Congress, but instead considered the validity of the finding itself.

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[5] *See United States v. Brown*, 472 F.2d 1181, 1182 (6th Cir. 1973)

The court pointed to known statistics and facts that supported the Congressional findings.[6]

Stevens interpreted the statute as prohibiting mere possession of a firearm by a felon, and sustained its constitutionality by reference to the explicit Congressional finding. The Supreme Court in *Bass* interpreted the statute to require actual proof of interstate commerce as an element of the offense, rendering *Stevens* invalid.[7]

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[6] The Court stated:

> We return then to consider the Congressional finding that firearms in the possession of convicted felons pose a threat to interstate commerce. A citation of authorities and statistics supporting this finding is unnecessary. All convicted felons have flouted the law at least once. The existence of an alarmingly high rate of recidivism among convicted felons has been established by unquestioned authority. In the instant case, Stevens after having committed armed assault in 1958, and after having committed voluntary manslaughter in 1962, was found in possession of a small deadly firearm in 1969. There can be no serious doubt that the possession of firearms by convicted felons is a threat to interstate commerce. The statistics contained in Senate Report No. 1097, 90th Cong., 2d Sess. (1968), alone justify this conclusion. 18 U.S.C. App. §1201(1) quoted statement of facts of public knowledge of which this court will take judicial notice; e.g., firearms are used to highjack airplanes, rob banks insured by the Federal Deposit Insurance Corporation or commit other crimes seriously affecting commerce. *Id.* at 151-52.

[7] *United States v. Wilson*, 456 F.2d 1042, 1043 (6th Cir. 1972). Like mere possession of a firearm by a felon, the far more dangerous crime of armed robbery is traditionally a state offense over which there is no federal jurisdiction. In *United States v. Yokely*, 542 F.2d 300, 304 (6th Cir. 1976), the court noted that assertion of federal power over armed robbery would be "an unprecedented incursion into the criminal jurisdiction of the states." (Citation omitted.) Citing *Bass*, the court added that Congress had not "expand[ed] federal criminal jurisdiction to include all armed robberies having any effect on interstate commerce. . . ." *Id.* at 305

In *United States v. Day*, 476 F.2d 562, 566-67 (6th Cir. 1973), the court upheld under the *Bass* and *Perez* precedents the prohibition on engaging in the business of dealing in firearms without a license, because Congress made detailed findings of an effect on interstate commerce:

> Just as Congress made findings that intrastate credit transactions were part of a class of activities amenable to federal regulation, the Act before this court reveals detailed findings of the interrelationship between the business of selling guns and interstate crime and interstate trafficking in guns. Congress found specifically that:
>
> "[O]nly through adequate Federal control over interstate and foreign commerce in these weapons, and over all persons engaging in the business of importing, manufacturing, or dealing in them, can this grave problem (interstate trafficking in firearms) be properly dealt. . . . "P.L. 90-351, Section 901 (a)(3), 82 Stat. 225 (emphasis added).
>
> . . . . Congress certainly had the power to regulate intrastate gun sales which have an effect on interstate commerce in firearms. We hold Section 922(a)(1) to be constitutional.

As to the prohibition on possession of firearms in interstate commerce by such narrowly-defined persons as felons and persons dishonorably discharged from the Armed Forces, the Court wrote: "Although *Stevens* is no longer good law on the statutory interpretation of Section 1202(a), in light of *Bass*, its viability on the constitutional question of whether the Congress can forbid certain classes of people from possession firearms is hereby reaffirmed." *Id.* at 568.

Similarly, *United States v. Nelson*, 458 F.2d 556, 558-59 (5th Cir. 1972) applied the teachings of *Bass* and *Perez* to the prohibition on sales by a licensed dealer to a felon, concluding:

> We believe that the *acquisition of firearms by convicted felons* and persons under indictment for felonies, although arguably intrastate activity, imposes a sufficient burden upon interstate commerce to be a proper subject for federal regulation. . . .
>
> Moreover, we believe that *acquisition* of firearms is more closely related to interstate commerce than *mere possession*. Therefore, while the Supreme Court in *Bass* impliedly expressed some reservations about Congress' power to regulate *possession* of firearms, we entertain no doubt that it has the power to regulate their *acquisition* without requiring proof of a nexus with interstate commerce in each individual case. *Id.* at 559 (emphasis added).

The lack of constitutional power to ban mere possession of firearms by law-abiding citizens was made clear in a study by the Congressional Research Service, Library of Congress, entitled *Gun Control: The Constitutionality of Federal Prohibitions on the Mere Possession of Firearms as an exercise of the Commerce Power*, reprinted in *Handgun Crime Control*, Hearings before Subcom. to Investigate Juvenile Delinquency, Senate Judiciary Com., 94th Cong., 1st Sess, 1358 (1976). Mere possession is neither "interstate" nor "commerce":

> The obstacle in regard to congressional action aimed at mere possession of a firearm is that no commercial nexus naturally follows from an act of simple possession, and no crossing of interstate boundaries necessarily takes place . . . . A mere possession statute which is not based on use or sale does not as naturally lead to the conclusion that the activity proscribed does itself affect interstate commerce. Possession is of course not an activity but rather a state of ownership of physical control. While actions may be taken as a result of that possession, it is not the possession itself which causes the result. *Id.* at 1372-73.

Moreover, a general prohibition directed at the law-abiding general population would be far too broad to be upheld as "affecting interstate commerce". As the study states:

> One additional facet to the problem of enacting a prohibition on mere possession is that of demonstrating that there is some common link between all those who possess the firearm outlawed such that a single, identifiable evil has been formulated which can be examined by the court. Under the requirement of rationality it may be easier to proscribe the possession as to a particular group (e.g., convicted felons, mental incompetents, those dishonorably discharged etc. . . .) than to the population as a whole. For in a specific statute factors such as recidivism, social patterns, and statistical evidence may be utilized to bridge the gap between use and mere possession. *Id.* at 1376.

Article I, Section 8 of the Constitution limits the powers of Congress to specifically enumerated purposes. This is not some technical requirement that can be ignored because of the "public safety." As noted in *Marbury v. Madison*, 1 Cranch. 137, 176-77 (1803):

> The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

In sum, Section 922(o) would not be an exercise of the interstate commerce power or any other enumerated power of Congress. Accordingly, this court must declare Section 922(o) unconstitutional.

Petitioner is mindful of the holding of the Circuit Court of Appeals in *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992). However, in the discussion of the issue finding 26 U.S.C. §5861(d) as a valid exercise of the taxing power of Congress there is no reference to *U.S. v. Rock Island Armory, Inc.*, 773 F.Supp. 117 (C.D.Ill. 1991). Petitioner would argue that the same principle applies. In that case the statute disallowed registration of machine guns and, thus, no longer could be used for the collection of revenue. Analogously, in the present case, the absence of the reference to interstate commerce deprives the statute of any constitutional basis to regulate intrastate activities. *Hale* also does not specifically refer to the time of procurement of the weapons and overlooks the fact that *U.S. v. Evans*, 928 F.2d 858 (9th Cir. 1991) found any nexus tenuous.

A very recent case supporting Petitioner's position is *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993)

Lopez involved a different subsection of 18 U.S.C. §922, to-wit: Subsection (q), which makes it a federal offense to possess a firearm in a school zone. However, the reasoning in *Lopez* is applicable to the constitutional analysis of the subject statutes.

In *Lopez*, the defendant-appellant arrived at his high school carrying a concealed .38 caliber handgun. *Lopez*, 2 F.3d at 1345. School officials confronted him on the basis of an anonymous tip, and he admitted carrying the weapon. *Id.*

The *Lopez* defendant was charged with violating 18 U.S.C. §922(q), which makes it a federal crime to possess a firearm in a school zone. Defendant challenged the constitutionality of the statute on the ground that prohibiting possession of weapons on

school grounds was not within Congress' power to regulate interstate commerce.

In addressing this issue, the Fifth Circuit Court of Appeals noted, at the outset, that federal laws prohibiting possession of a firearm require the government to prove a "connection to commerce, or other federalizing feature." *Id.*, at 1347.

The *Lopez* court proceeded to examine the history of federal firearms legislation, beginning with the National Firearms Act of 1934, 48 Statute 1236-1240. *Id.* at 1348-49. The *Lopez* court noted that this act involved a narrow class of weapons, to-wit: machine guns, "sawed off" shotguns, rifles, silencers, and the like. *Id.* at 1349. The court observed that the act was justified on the basis of Congress' taxing power; pointing out that the prohibitions were keyed to the imposition of an excise tax on the transfers of the weapons. *Id.*

The *Lopez* court noted that the subject statute, 18 U.S.C. §922(q), had no roots in the National Firearms Act of 1934, and was not tied to taxation or to an incident of reporting or registration pertaining to the business of transfer of firearms. *Id.*

The *Lopez* court observed that the Federal Firearms Act of 1938 prohibited "any manufacturer or dealer not licensed thereunder" from transporting, shipping or receiving any firearm or ammunition in interstate or foreign commerce." 2 F.3d at 1349.

Continuing with its historical analysis, the *Lopez* court noted that the Omnibus Crime Control and Safe Streets Act of 1968 repealed the Federal Firearms Act, and incorporated the provisions of that act with some amendments, and added firearms offenses. 2 F.3d at 1350. The *Lopez* court remarked that there was one important difference: the Omnibus Crime Control and Safe Streets Act required a federal license for *intrastate* sales. *Id.*

The *Lopez* court reasoned that the interstate commerce basis still obtained, however, where Congress made an express find-

ing that, given the proliferation of weapons, control of *intrastate* sales was essential to the control of *interstate* sales. *Id.* at 1350-51.

The *Lopez* court noted that the subsequent Gun Control Act of 1968 maintained the same essential jurisdictional bases of the earlier 1968 legislation, namely:

> An express nexus to interstate commerce or to the conduct of, or dealings with, federal licensed dealers or manufacturers, or to both. *Lopez*, 2 F.3d at 1353.

Examining the Firearm Owner's Protection Act of 1986, the *Lopez* court found that it, too, was based on the same jurisdictional structure, to-wit: that the licensing of all firearms dealers and manufacturers was predicated upon an express finding by Congress that such licensing was necessary to ensure adequate federal control of interstate commerce in firearms. 2 F.3d at 1354.

The *Lopez* court noted that, like section 922(q), Section 922(o), banning transfer of machine guns, prohibits mere possession "with no express tie either to interstate commerce or other federalizing element." 2 F.3d at 1356. The *Lopez* court proceeded to state:

> We decline to read into section 922(q) any implied Congressional determination that possession of firearms generally, or within one thousand feet of any school grounds, affects interstate commerce. 2 F.3d at 1356.

Further regarding this point, the *Lopez* court observed by way of a footnote:

> There is nothing to suggest any finding that mere private party intrastate possession of firearms that have not moved in interstate commerce has any effect on interstate commerce or must be regulated in order to effectively regulate interstate commerce. 2 F.3d at 1357, n.31.

Commenting on Congress' authority to regulate interstate commerce, the *Lopez* court noted that the scope of this power was "not unlimited". *Lopez*, 2 F.3d at 1361. Before Congress can intrude upon state prerogatives, the *Lopez* court observed, it must find that the activity it seeks to regulate exerts a "substantial economic effect" on interstate commerce. 2 F.3d at 1361, citing *Wickard v. Filburn*, 317 U.S. 111, 125, 63 S.Ct. 82, 89, 87 L.Ed. 122 (1942). It is not sufficient that the subject activity conceivably produces a "ripple effect". 2 F.3d at 1361, citing *Maryland v. Wirtz*, 392 U.S. 183, 88 S.Ct. 2017, 2024, 20 L.Ed.2d 1020 (1968).

The *Lopez* court further observed that when Congress wishes to stretch its commerce power so far as to intrude on State prerogatives, it must "express its intent to do so in an unmistakably clear fashion." *Lopez*, 2 F.3d at 1365.

In holding that section 922(q) is unconstitutional, the Fifth Circuit Court of Appeals in *Lopez* found that there was no Congressional finding or legislative history or evidence to support the determination that the business of elementary, middle and high schools affects interstate commerce. 2 F. 3d at 1366.

Similarly, the subject statute, 18 U.S.C. 922(o), is unconstitutional in the absence of a finding that the mere possession of a machine gun affects interstate commerce. There is no legislative declaration or Congressional committee finding to that effect. Similarly lacking constitutional muster are the federal statutes prohibiting the mere possession of a silencer not identified by serial number: 26 U.S.C. §§5861(d) and 5871. Such possession has no apparent affect on interstate commerce, and there is no Congressional finding or declaration that it does.

Accordingly, the District Court erred in denying Petitioner's motion to dismiss the counts of the indictment.

CONCLUSION

WHEREFORE, for the reasons, law, equity, and other considerations presented, Petitioner prays that this Honorable Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-2295

United States of America,
Appellee,

v.

Robin Pearson,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: September 17, 1993
Filed: November 1, 1993

Before McMILLIAN, WOLLMAN and MORRIS SHEPPARD ARNOLD, Circuit Judges.

McMILLIAN, Circuit Judge.

Robin Pearson appeals from a final judgment entered in the United States District Court[1] for the Eastern District of Missouri, after a jury verdict, finding him guilty of four counts of possession of a machine gun pursuant to 18 U.S.C. § 922(o) and one count of possession of an unregistered silencer pursuant to 26 U.S.C. §§ 5861(d) and 5871. The district court sentenced Pearson to concurrent terms of 27 months imprisonment on each of the five counts, two years supervised release and a special assessment of $250.00. For reversal, Pearson argues that the statutes under which he was prosecuted have no nexus with interstate commerce and are therefore beyond the scope of the

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[1] The Honorable Jean C. Hamilton, United States District Judge for the Eastern District of Missouri.

constitutional power of Congress. For the reasons discussed below, we affirm the judgment of the district court.

On June 23, 1992, Pearson's residence was searched by St. Louis police officers and one agent of the Bureau of Alcohol, Tobacco and Firearms (AFT) pursuant to a search warrant. The officers and AFT agent seized numerous weapons and gun parts. These included one Uzi carbine, one Heckler & Koch 9mm machinegun, one PWA Commando .223 caliber machinegun, one Uzi machine pistol, and one weapon with an attached silencer.

Pearson asserts that the statutes under which he was prosecuted, 18 U.S.C. § 922(o) and 26 U.S.C. §§ 5861(d) and 5871, have no nexus with interstate commerce, and thus are beyond the constitutional power granted to Congress to regulate commerce. Pearson contends that these statutes regulate mere possession of firearms that have never crossed a state border. Pearson argues that Congress has regulated a class of activities without requiring proof that the intrastate activity has a nexus with interstate commerce. Although we independently review the validity of an act alleged to violate the Commerce Clause, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), such a review must be conducted in a highly deferential manner. *United States v. Evans*, 938 F.2d 858, 869 (9th Cir. 1991) (*Evans*).

This court has recently considered and rejected the identical constitutional challenges raised here in *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992) (*Hale*), *cert. denied*, 113 S.Ct. 1614 (1993). Although Congress need not make specific findings of fact to support its conclusion that a class of activity affects interstate commerce, if Congress makes such findings they carry great weight in this court's analysis. *Perez v. United States*, 402 U.S. 146 (1971). *Hale* examined the legislative history of § 922(o) and determined that Congress adequately addressed the relationship between the proliferation of machine guns, violent

crime, and narcotics trafficking. *See* H.R. Rep. No. 495, 99th Cong., 2d Sess., at 1-5, *reprinted in* 1986 U.S.C.C.A.N. 1327, 1327-31; *Hale*, 978 F.2d at 1018. Congress reasonably concluded that mere possession of firearms threatens the lives and safety of law enforcement officials and the public at large. Accordingly, the enactment of 18 U.S.C. § 922(o) represents a valid exercise of Congress' commerce clause power.

Pearson also challenges the constitutionality of 26 U.S.C. §§ 5861(d) and 5871 as beyond any enumerated power of Congress. However, the same general reasons justifying § 922(o) are equally applicable to these statutes. The Ninth Circuit has upheld § 5861(d) as a valid exercise of Congress' power to tax. *See United States v. Tous*, 461 F.2d 656, 657 (9th Cir. 1972) (citing *United States v. Giannini*, 455 F.2d 147 (9th Cir. 1972)). The Sixth Circuit has upheld §5861(d) as a rational means of maintaining the public order. *See United States v. Warin*, 530 F.2d 103 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976).

Therefore, we reject Pearson's arguments and conclude that 18 U.S.C. § 922(o) and 26 U.S.C. §§ 5861(d) and 5871 are within Congress' enumerated powers to regulate interstate commerce under the Constitution.

Accordingly, we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-2295

UNITED STATES OF AMERICA,
Appellee,

v.

ROBIN PEARSON,
Appellant.

APPELLANT'S MOTION FOR REHEARING BY PANEL

Comes now Appellant, Robin Pearson, by and through his attorneys of record, Shaw, Howlett & Knappenberger, and for his motion for rehearing states that the Court of Appeals, as exhibited by its opinion of November 1, 1993, has overlooked and/or misinterpreted material matters of law and facts in the following respects, to-wit:

The Fifth Circuit Court of Appeals on September 15, 1993, decided the case of *United States of America v. Alfonso Lopez,* Docket No. 92-5641. In reversing the conviction of the appellant, the court found the provision of 18 U.S.C. Section 922(q) to be unconstitutional and beyond Congress' power to legislate over the public schools of the state.

In analyzing the provision of Section 922(q), the Fifth Circuit discusses the constitutional challenge to section 922(o) and this court's decision in *United States v. Hale,* 978 F.2d 1016, 1018 (8th Cir. 1992), *cert. denied,* 113 S.Ct. 1614 (1993) which was relied upon in affirming the conviction of Appellant Robin Pearson.

In *Hale*, as relied upon by this court in its opinion at page 3, the legislative history of Section 922(o) was discussed.

> "Congress reasonably concluded that mere possession of firearms threatens the lives and safety of law enforcement officials and the public at large." *Pearson* opinion at 3.

The *Lopez* court disagrees with the general statements of *Hale* and *United States v. Evans*, 928 F.2d 858 (9th Cir. 1991) regarding the Omnibus Crime Control and Safe Streets Act of 1968, and the Gun Control Act of 1968. *Lopez* n.31 at 41.

The Fifth Circuit *Lopez* court notes that

> " . . . The only portion of the cited passage of the H. R. Rep. No. 495 that relates to machine guns — and it will be recalled that neither section 922(o) nor anything comparable to it was included in the bill (H.R. 4332) there being considered — is a discussion of the history of the legislation, including various earlier bills that did not become law. One of the earlier bills discussed was H.R. 3135, introduced August 1, 1985, and H.R. Rep. No. 495 observes that H.R. 3135 "prohibited the transfer and possession of machine guns, used by racketeers and drug traffickers for intimidation, murder and protection of drugs and proceeds of crime. The bill allowed possessors of lawfully registered machine guns to continue their lawful possession" *Lopez* at 40-41.

The *Lopez* court also did not agree with the *Evans* court conclusion of a congressional finding that a nexus exists, *Lopez* n.31

> "The Congressional finding alluded to is not contained in the Firearms Owners' Protection Act, and the only similar finding we can locate is that contained in H.Rep. No. 1577 in reference to H.R. 17735, which became the Gun Control Act of 1968. See H.Rep. No. 1577, 90th Cong., 2d Sess., reprinted in 1968 U.S.C.C.A.N. 4410."

Even though the *Lopez* court intimated no views as to Section 922(o), they did not regard *Hale* and *Evans* as "persuasive respecting either the validity of Section 922(q) or the existence of express or implied Congressional findings supportive thereof." *Lopez* at 42.

As applied to the facts of this case the divergent reading of the legislative history has led to a misapplication of the law.

The Appellant possessed these weapons without any proof that they affected interstate commerce in any way. The mere possession of a weapon and made automatic purely intrastate is not interstate firearms traffic and does not accomplish that objective as the *Lopez* court found as the purpose of the legislation. *Lopez* at 40 n.31.

Hale also refers to Pub.L. No. 90-351, 82 Stat. 197, 225 (1986) and 901(a) of P.L. 90-351. These provisions speak of the regulation or need to regulate both interstate (and foreign) commerce in firearms and federally licensed dealers. Nothing supports the conclusion of the *Hale* court's nexus as there is no reference to private party or purely intrastate possession of firearms of any kind. Viewed against this legislative history perspective, it would seem that the omission of the phrase "affecting interstate commerce" in 922(o) was intentional and as such attempts to impermissibly reach purely intrastate activities.

WHEREFORE, for the above reasons, Appellant respectfully requests that this Honorable Court grant him a rehearing of this matter.

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KNAPPENBERGER

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Copy hereof mailed this 10th day of November, 1993, to Mr. Richard L. Poehling, Assistant United States Attorney, United States Court & Custom House, 1114 Market Street, St. Louis, Missouri 63101.

/s/ Charles M. Shaw

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-2295EMSL

United States of America,
Appellee,

v.

Robin Pearson,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

The petition for rehearing filed by the appellant has been considered by the court and is denied.

December 8, 1993

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit